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Constitutional Principle

(No. ONE)

In re the office of
**His Majesty's Attorney
General**

Speech of
JOHN W. HUGILL, K.C., M.L.A.
(Ex. Attorney General)

Delivered in the Legislative Assembly
at Edmonton, Alberta, on Tuesday,
February, 28th, 1939

UNIVERSITY OF ALBERTA

"The Law is the greatest possession that the King has, for by the Law he himself and all his subjects are governed; and if there were no Law there would be no King and no Kingdom."

(Year Book of Henry VI)

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WITH COMPLIMENTS OF
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I hope you will find time to read this

J.W.H.

THERE being no Hansard or other official report of debates in the Legislative Assembly, recourse has been had to notes made at the time. In substance the following fairly represents my contribution to this debate with necessary revision to preserve sequence and to eliminate repetition consequent upon interruptions which added nothing of value as information or argument.—“J.W.H.”

Constitutional Principle

MR. SPEAKER:—

Upon rising to move the Resolution standing in my name on the order paper, seconded by the Member for Camrose, I do so with apprehension and perhaps some trepidation. Not, Sir, as to the merit of the Resolution itself which I am submitting for the consideration of this Assembly, but rather my concern for its proper presentation. The subject matter may suffer at my hands, an unhappy phrase or trend of argument may detract the attention of Members from its real merit.

This resolution follows, of course, the attempt I made, during the last preceding Session to introduce a Bill to amend the Attorney General's Act (Cap. 6, Alta. S. 1906 R.S.A. Cap. 10). I had entertained the hope and expectation that the Government leader would have allowed the Bill to reach the stage of a second reading at least, so that the principle involved could at that time have been debated upon its merits and have so obviated this present course, the only other means open to me to bring it, Sir, to the attention of the Assembly (vide Journals 7th Session, November 16, 1938.)

I conceive the subject to be so *important*—so serious a matter in its relation to the administration of our Provincial affairs, I unhesitatingly urge that serious consideration which I feel is incumbent upon every Member of this Assembly to give to it, divorced, I hope, from all per-

sonal considerations nor should it be disparaged by the mode of presentation, I will now read the Resolution:

"Resolved that the Government do introduce a Bill at this Session amending The Attorney General's Act to provide that the appointee to the office of Attorney General shall be a member of the Law Society of Alberta of at least ten years' standing."

That was the substance of the amending Bill which I sought to introduce. It related to Section No. 2 of the original Act, providing for the appointment by the Lieutenant-Governor of the Member of Executive Council who "shall *ex officio* be His Majesty's Attorney General in and for the Province." It purported to add as a necessary qualification for the appointment that he *be a member of the Law Society of Alberta of at least ten years' standing.*

ORIGIN OF OFFICE

It is pertinent to consider the origin and nature of the office. I need hardly remind Members, Sir, that it is an ancient and honourable office, one that has maintained since early times in the constitutional history of the British people. It is inseparably associated with such conceptions as are aroused in us by the phrases constitutional liberty, Habeas Corpus, the Petition of Right and *the rule of law.*

The inception of the office is easily traceable to the fact that the King, as supreme "justiciar," in whom reposed the rights and liberties of the people, the administration and maintenance of the laws in their behalf, could not himself appear in his own Courts. It was necessary that he appoint some qualified person to do so. This person so appointed became known as the "King's Attorney" and subsequently with the evolution of our constitutional government, the occupant of the office is now known both here and at Westminster as His Majesty's "Attorney General."

APPOINTMENT AND PRECEDENCE

The appointment, in England, is made from those members of the legal profession known as Baristers-at-Law practising before the Courts there, men who have been regularly admitted as Students-at-Law, who have by reason of their train-

ing and studentship been admitted to practice and have become leaders, entailing distinction in the profession. The office has always been regarded as one highly respected in the public service, as that height of legal eminence worthy of aspiration to.

The practice revolving around this appointment has been generally followed in British Dominions. Here, the Minister of Justice is His Majesty's Attorney General for Canada and the incumbent of that honourable office is always accorded recognition and great respect as the titular head of the legal profession throughout the Dominion. Correspondingly, His Majesty's Attorney General in and for the Province of Alberta, if he be a properly enrolled member of its Law Society, enjoys the distinction of being regarded as the head of the profession in Alberta, acknowledging seniority of precedence only to His Majesty's Attorney General for Canada.

POWERS AND DUTIES

It is now convenient to refer to Section 3 of the Statute:

"(c) He shall be entrusted with the powers and charged with the duties which belong to the Attorney General and Solicitor General of England by law or usage so far as the same powers and duties are applicable to the Province; and also with the powers and duties which belong to the office of the Attorney General and Solicitor General in respect of the laws of Canada and of the Province to be administered and carried into effect by the Government of the Province."

My respectful submission then, Sir, that the appointment is to be regarded as in England is confirmed by the Statute itself. I am satisfied that the members of our first Provincial Legislature, 1906, (twenty-five good men and true) never contemplated that the office would be occupied, in defiance of custom and usage, by any other than one properly qualified to assume its duties and responsibilities. The purpose of the Resolution then is merely to remove any doubt as to the intentment, *to ensure the attainment of the object of the Act according to its true intent, meaning and spirit.*

I do not know, Sir, of any single instance in Canada when this honourable

office has been assumed by any person other than a member of the legal profession except as a matter of very temporary expediency. Such cases of expediency incident to Governmental Administrations but prove I submit the custom and usage enshrining its occupation.

OATHS OF OFFICE

His Majesty's Attorney General receives his portfolio from His Honour the Lieutenant Governor, who is in fact as in law the head of the Provincial Government. He takes an oath of office as a member of the Executive Council which in part reads:

"You will in all things to be moved, treated and debated in any such Executive Council, faithfully, honestly and truly declare your mind and opinion to the honour and benefit of the King's Majesty, and the good of His Subjects without partiality or exception of persons, in no wise forbearing so to do from any manner of respect, favour, love, meed, displeasure, or dread of any person or persons whatsoever."

Then as the "Attorney General" he must "solemnly and sincerely promise and swear that he will duly and faithfully and to the best of his skill and knowledge execute the powers and trusts reposed in him as ATTORNEY GENERAL of the Province of Alberta."

At the same time, also before His Honour, he takes the oath of allegiance.

We must further remember, Sir, that as a lawyer, conforming to "The Legal Profession Act," he was required to take and subscribe to the Oath of a Barrister and Solicitor before a Judge or Judges of the Supreme Court of Alberta in open Court (vide Sec. 37, S.S. 1, R.S.A. Cap. 206-b) which in part reads:

"I will not pervert the law to favour or prejudice any man, but in all things conduct myself truly and with integrity, in fine, the King's interest and that of my fellow-citizens' I will uphold and maintain according to the law in force in this Province."

May I further observe, Sir, that the code of honour of the legal profession is at once its most cherished possession and the most valued *safeguard of the public*. He must at all times endeavour to maintain a perfect poise amidst the various and sometimes conflicting claims upon his

advocacy, his duty to the immediate cause, to his opponent, to the Court or other Tribunal, to the State and to himself, all to uphold the "Law" defined as *the discovery of truth*.

RESPONSIBILITIES

The duties and responsibilities of the Attorney General are set out in detail in the Statute. I should like, Sir, to refer to one or two of them:—

"Section 3.—(a) He shall be the official legal adviser of the Lieutenant Governor;

"(b) He shall see that the administration of public affairs is in accordance with law;

"(c) He shall have the superintendence of all matters connected with the administration of justice in the Province within the powers or jurisdiction of the Legislative Assembly or Government of the Province;

"(d) He shall advise upon the legislative acts and proceedings of the Legislative Assembly of the Province and generally advise the Crown upon all matters of law referred to him by the Crown;

"(j) xii The consideration of matters of a public nature such as proposed legislation;"

It is to be observed that as the "*official legal adviser of the Lieutenant Governor*" he must be prepared to so advise His Honour on any matters connected with the administration of the Provincial Government and its legislation. He is "on call" so to speak and must be ready to respond to that call by giving his opinion without fear or favour, as he swears by his Oath of Office so to do. As a member of the Law Society he must always act strictly in accordance with the law applicable in the Province.

DEMOCRATIC GOVERNMENT

Full democratic government as developed in Great Britain after centuries of trial and error is one of the main principles upon which the Empire is founded and the chief justification for its continuance as the British Commonwealth of Nations, the keystone to this remarkable edifice, the foundation of the whole structure I suggest, Sir, is the principle of the rule of law. "The object of law," says an eminent jurist, "is order," and the result of order is that we are enabled thereby to look ahead with at least some sort of security as to the future.

This means that no British subject can be punished by the executive of government except for the breach of some known or ascertainable law, and then only before a properly constituted Court, whose officials are uninfluenced either by the wishes of the government of the day or by bribery or otherwise.

This was a fundamental right of the Anglo-Saxon receiving as it did a declaration from Sovereignty in Magna Carta in the words, "To no man will we sell, or deny, or delay, right or justice."

So deeply is this principle ingrained in the life of the Anglo-Saxon peoples that we are apt to take it for granted and to overlook its vital importance to the freedom in life which each one of us enjoys in this great Dominion as our legacy and and also may I add, our responsibility to maintain.

In some European countries today people can be tried and punished for offences which are not breaches of any pre-existing law, but merely for certain acts which are considered to be contrary to "public sentiment," whatever that is defined to be by the government at the moment.

WRITTEN CONSTITUTION

The strongest link between the two English speaking peoples upon this North American continent is to be found in the fact that we both approach our *politics* by the same—a *legal*—avenue. We both have written constitutions, ours rests upon the British North America Act. Under that authority, Sir, you now sit as Mr. Speaker, presiding over the Sessions of this Assembly and we members enjoy certain immunities and privileges, vote estimates and supplies, assume the duty to see they are properly spent, enact legislation and, perhaps not less onerous, vote our own indemnities.

Sir, the state ought not to be considered nothing better than a partnership agreement in a trade deal—to be taken up for a little temporary interest and to be dissolved by the fancy of the parties.

It is to be looked on with other reverence—for it exists not only between those

who are living but those who are dead and those who are to be born.

A right which it is suggested must form the basis of all sound legislation constructive or destructive—the right to the safeguarding of legitimate expectations.

It is essential for us all to remember as Canadians that we are citizens of the Dominion of Canada rather than merely of the Province of Alberta. Whether of the old or the new Provinces the problems of today are sufficiently complex to test the highest capacity for self-government.

OUR COMMON HERITAGE

Personal liberty, equality before the law and security of property rights were guaranteed by the great Charter, seven centuries ago, these are now our common heritage. They were established in these Territories in 1870. We share this "*storied greatness of an ancient polity*" with our sister Provinces in Federal Union as the Dominion of Canada and are, I hope and believe, Sir, primarily Canadians, having a proper regard for our own welfare in local and Provincial matters in the contemplation of Canada as a whole, a young, virile, democratic member of the British Commonwealth.

All our hopes, our well being as a Canadian people are dependent upon our national unity. Its continuance is an individual care, a signal civic duty. The rights, liberties and privileges we can enjoy under our constitution as the Dominion of Canada require a proper regard in each of us for the obligation to see that these rights, liberties and privileges so desired are not filched away from us overnight under a demagogic allurements of bewildering, reckless and extravagant promises for our betterment. The members of this Assembly surely, Sir, need not to be reminded that respect for the constitution of our country is fundamental to all sane and stable administration in the body politic. *There can be no compromise with the abuse of legislative competence.*

CONSTITUTIONAL PRINCIPLE

"*It is an obvious truth,*" said Edmund Burke, "*that no constitution can defend*

itself, it must be defended by the wisdom and fortitude of men." Burke further reminds us that:

"Every age has its own manners, and its politics dependent upon them; and the same attempts will not be made against a constitution fully formed and matured, that were used to destroy it in the cradle, or to resist its growth during its infancy."

Hence today constitutional principle is everywhere upon the defensive. Must we not, Sir, continually remind ourselves as Legislators and, yes, have we not a duty also to remind all those placed in authority over us that "*a spirit of reformation is never more consistent with itself, than when it refuses to be rendered the means of destruction.*"

If we do, perchance, fail in this our individual care, our signal civic duty, *to be vigilant to preserve our ideals and respect for our constitution*, such vigilance, Sir, I cannot too strongly urge upon my fellow members, we shall fall deservedly, uncoerced by any eternal force, not borne down by any internal calamity, but in the full plethora of our wealth and the surfeit of our too exuberant prosperity. With our own rash and inconsiderate hands we are attempting to pull down on our own heads this edifice, this now venerable temple of our liberty and freedom and all hope of a definite share in future glory. Our historians may tell of other acts and other neglects as signally disastrous but of none more wanton, none more disgraceful. Surely, Sir, a nemesis awaits any government in this fair land that adopts unconstitutional methods. Those contemplated remedial measures, planted under the shadow of coercion, watered and nourished by the attempted suspension or defiance of our constitution must be, from their very nature, poor and sickly plants of alien origin, foredoomed to perish before they begin to grow.

CUSTOM AND USAGE

It is not lawful, Sir, to do an evil thing in the hope that good may some time come from it. The State no less than the individual members composing it does well to fear lest it do evil, dulling conscience under the cloak of political expediency in

the sole but vain hope that good may come. How much better, I suggest, Sir, that we should, each one of us, share Burke's belief in the power of tradition and of ancient processes of government to grapple with new situations if only those inherited methods are rightly handled, and those inherited traditions rightly understood.

Governments cannot reasonably be expected to perform miracles. It is not unreasonable, however, to look for the preservation of our individual rights, the continuance of well tried custom and usage, as essential ingredients of sound leadership. Is there not much wisdom, Sir, in a saying attributed to Francis Bacon that "*the contemplation of things as they are without substitution or imposture, without error or confusion, is in itself a nobler thing than a whole harvest of inventions.*"

LEGISLATIVE COMPETENCE

I submit, Sir, that in Canada generally, having in mind the terms of our written constitution, the B.N.A. Act, and as Legislators in a Provincial Assembly particularly, with its limited legislative competence in subject matter (vide Sec. 92), it is of the utmost importance, not only to ourselves but to our fellow citizens whose servants we are, that this legislative competence should at all times be reasonably determined before it is exercised. That duty of determining the constitutionality of our Acts is, *inter alia*, assigned to and devolves upon a qualified Attorney General. He must be prepared to so advise the Lieutenant Governor, the Executive Council, the various Departments of Provincial Administration and this Legislative Assembly.

May I recall by way of illustration, Sir, an incident of the 4th Session of this Assembly held in August, 1937. Those present on this occasion will perhaps recall that an Hon. member sitting on your left directed a question to me as the then Attorney General, sitting on your right as a member of the Government. As I remember the question, an academic one in that there was no Bill involved and before this Assembly for consideration at the time, the Hon. member sought informa-

tion as to our competence to legislate upon the subject of Banks and Banking.

My answer, of course, to this question was to refer the Hon. member to Section 91 of the B.N.A. Act, in which it would be found to be within the classes of subjects assigned to the exclusive legislative authority of the Parliament of Canada and was therefore not within the competence of this Provincial Assembly. Having in mind the statutory duties imposed by the Attorney General's Act, I do not think it could be considered improper that I so answered the question of the Hon. member, nor proper that I should have refused to answer such an academic question.

It is, Sir, my respectful submission that any Hon. member of this Assembly is well within his rights in seeking information from His Majesty's Attorney General and also his opinion as to whether we have as an Assembly of Legislators the necessary constitutional competence to enact laws concerning the general public and its welfare. The duty of the Attorney General in that respect is abundantly clear, it is set out in the governing Statute alluded to.

PROPAGANDISTS

Again I recall the occasion of a gathering of Government supporters during the same period of the 4th Session held in the first week of August, 1937, assembled in party caucus. With the full approval of The Honourable, The Premier then present—the following formula was submitted to me as Attorney General—apparently anticipating the introduction of certain Bills by the Government of doubtful constitutional validity. This formula read:

"So that we may be certain of our Bills receiving the assent of the Lieutenant Governor, we suggest that the Attorney General assures us that he feels in a position on every count to recommend that the Lieutenant Governor gives his assent to every Social Credit measure or appertaining to, it has been decided to submit of which he knows."

Apart altogether, Sir, from ethical considerations, not admitting of any such assurances being possible, His Majesty's Attorney General in and for the Province of

Alberta was to do or virtually die so far as his continued occupation of the office was concerned at the bidding of the "technicians," "experts" or perhaps more properly designated "propagandists," temporarily living at the expense of but not responsible to the people of Alberta, with the full approval of the Honourable The Premier and other members of this Provincial Executive Council. That such a situation under our form of constitutional government could arise and in fact exist seems now incredible. It is nevertheless true.

It would be impossible, Sir, for any properly qualified person occupying this honourable office in the Public Service to give any such assurance. I certainly could not, nor did I. On the last day of this 4th Session of the Legislature in the afternoon shortly before its prorogation, I accompanied the Honourable The Premier to an audience with His Honour the Lieutenant Governor in his office. His Honour requested my advice upon our constitutional competence as a Provincial Assembly to enact certain *Bills* then awaiting assent.

As the Attorney General, I gave the only advice possible, viz., that the proposed enactments were not within our legislative competence. The soundness of the opinion then given has since been amply confirmed by our highest Tribunals to which they were referred at a cost to this Provincial Treasury, according to a government return to question asked, of \$20,033. Having had the temerity to disagree, Sir, with the opinion of the Honourable Premier as expressed during the audience alluded to, my resignation, as requested, was of course, as promptly tendered immediately after the Assembly had risen and I could address myself to it.

PROVOCATIVE LEGISLATION

The acceptance of such a formula would be and the acquiescence in the enactment of such legislation, is tantamount to shaking the very foundation of our constitution and national unity. We cannot, Sir, approbate its benefits on the one hand and reprobate some of its terms on the other. His Majesty's Attorney General cannot by any stretch of imagination be at any time

considered as a miracle worker, although he may on occasion and within his own sphere be regarded as more knowing than others. Though he may and should give his advice with due respect for the responsibility he assumes in so doing, he can at no time be held to have inspired the conduct of those acting otherwise than in accordance with the advice he has given.

LEGAL QUALIFICATIONS

Adverting, Sir, to the requirement of the resolution that His Majesty's Attorney General should at least be a member of the legal profession, it is pertinent to observe that the portfolio of Health is held by a member of the medical profession, presumably in good standing in that noble service, no one rejoices more than I do, Sir, in that most desirable "un fait d'accompli" in relation to our Provincial affairs. May I ask, the Honourable Premier whether he would feel justified in relinquishing his portfolio of Education in favour of another with no experience whatever in pedagogy? Having in mind his experience, his life work as a member of the teaching profession, I venture to suggest, Sir, the Honourable Premier would protest vigorously it was not in the public interest that his portfolio should be so assumed.

Is the Honourable Premier by this reasoning, Sir, warranted in his assumption of the office of Attorney General, having neither the experience nor the requisite qualifications, prescribed by custom and usage, relating to that office? I venture to suggest that there may be occasions on which he will find the assumption at the very least, embarrassing. It could not be expected of him that he would know or have had the practice or the experience necessary to the giving of a sound opinion e.g. to the Lieutenant Governor on our legislative competence at any time. Certainly the results since September, 1937, do not admit of any other conclusion.

To think in legal terms and to convey such thoughts for practical application itself requires no inconsiderable familiarity with legal phraseology as developed in the older countries. Though broadened per-

haps by transplanting in the newer lands of this North American continent, the same phraseology is sustained with even added lustre and vigour.

PROFESSIONAL EXPERIENCE

Mr. Speaker, there now remains, to be referred to briefly, that portion of the Resolution restrictive of a member of the legal profession to ten years' standing as a further pre-requisite qualification of the Attorney General. You are aware, Sir, of the honour sought and conferred upon members eminent in the legal profession, viz., the distinction, evidenced by letters patent, of being appointed, during pleasure, Provincial officers under the name of "His Majesty's Counsel," learned in the law, for the Province of Alberta, generally known as "King's Counsel." Time will not admit of my referring to the origin and custom relative to this distinction. Its creation, qualifications and precedence accorded, is the subject matter of a Provincial Statute, "The King's Counsel Act" (Cap. 207 R.S.A. 1922).

It is a pre-requisite of eligibility for this distinction under our Act that no person shall be appointed who has not been entitled during *ten years* to practice in the Superior Courts of Great Britain or Canada. Notwithstanding that we are well equipped with Law Faculties in our several universities throughout the Dominion, where legal training is of a high order not overlooking our own university, unique in this respect, some years at least in the realm of experience are necessary to ensure confidence and a sound application of legal knowledge in the reality of practical affairs. Is it then an unreasonable provision that a King's Counsel should be required to have had ten years of such opportunity for practical experience—our earlier Legislators have not thought it so—how much stronger a reason then can be advanced with respect to the qualifications of His Majesty's Attorney General, who becomes—from that fact itself—the *titular head of the profession in our Province*.

CROWN PRACTICE

It is conceivable, Mr. Speaker, that occasions will arise when the personal

appearance of His Majesty's Attorney General in our Courts — to plead causes in the public interest — is both desirable and necessary. The present occupant, not being qualified as a Barrister and Solicitor, could, I respectfully submit, Sir, be received in the Courts only upon sufferance, if at all. This would be an unfortunate situation to contemplate. Moreover, not only is His Majesty's Attorney General concerned with the administration of Provincial legislation, but with the laws enacted by the Dominion Parliament, applicable of course in this Province. In the administration of the Criminal Code, the Attorney General is responsible for the preferring of indictments and Crown prosecutions, in fact he discharges the duties and assumes the responsibilities of the Grand Jury in older Provinces. It is my submission, Sir, that the proper appreciation and discharge of these duties require not only knowledge of the law generally but at least some experience of its application and interpretation—a profound sense of responsibility is involved whenever life and liberty, the preservation of law and order, is at stake, as unhappily too frequently occurs.

RESPECT FOR INSTITUTIONS

Good behaviour it is said, Sir, is the cement of any well ordered and stable society. Without it there neither is nor can be safety or order in this Province or any other portion of this great Dominion. Respect for our institutions, their meaning and purpose, by those occupying high places is of the very essence of good behaviour. Institutions which have stood the acid test of time cannot be hastily discarded or thrown aside nor prostituted to satisfy an hasty and ill becoming mood of personal expediency or something else we know not of, by any in authority who have sworn to uphold them as a prerequisite to the assumption of that authority. The office of His Majesty's Attorney General in this Province of Alberta is being prostituted today. (On Mr. Speaker's ruling I withdrew the term "prostituted.")

The essential difference between the extremists and the rationally minded, I think, Sir, we should be rationally mind-

ed more particularly so in this day and generation, this difference may be stated as in the case of the one, the extremist, all interest centres in immediate reform, *immediate reform!* In the other there is sympathy for *established institutions, for usage and custom, and a desire to interpret their true meaning before any reformation or denial is attempted.* We need something of the spirit of the Fathers of Confederation. We now enjoy the result of their unbending purpose and their unwavering rectitude. We have free minds and can still look around us conscious of unfettered liberty, nothing need intimidate us. Reforms there must be if we are to continue advancing upward and onward within the ambit of our freedom. "*To direct the unrest of our times into constructive and away from destructive channels,*" is the acknowledged task of statesmanship today.

In conclusion, Mr. Speaker, I submit the occasion to be one needing the sonorous tones of a great constitutional statesman such as Edmund Burke was. The power of his personality—the cogency of his rhetoric to adequately impress upon this ~~assembly~~ the importance of the resolution ~~before~~ it. While lacking those qualities, I may implore in Burke's spirit, and recall that "the true lawgiver ought to love and respect his fellows and fear himself." In this spirit, Sir, I recommend the resolution now before the Assembly to the earnest consideration of the members present. In so doing may I express the hope that I have not detracted in any way from its merits or unhappily been the occasion of any personal affront.

Suum Cuique.